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Nos. 2 and 3

In the Supreme Court of the United States

OCTOBER TERM, 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, A FEDERALLY CHARTERED CORPORATION, APPELLANT

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, AND THE STATE OF ALASKA

ORGANIZED VILLAGE OF KAKE, AND ANOOON COMMUNITY ASSOCIATION, APPELLANTS

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEALS FROM THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Interest of the United States	1
Summary of argument	2
Argument	6
I. The State of Alaska lacks jurisdiction to require the elimination of the appellant Indians' fish traps	7
A. Introduction	7
B. Control over Indian fishing was reserved to the United States under Section 4 of the Alaska Statehood Act	9
C. The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with "equal footing" or with the Submerged Lands Act	26
II. The bases of the decision of the Supreme Court of Alaska are erroneous	30
A. Congress had power to reserve federal jurisdiction over Alaska native fishing, and did so in Section 4	31
1. The federal Indian power extends to Alaska	31
2. The proposed Constitution for the State of Alaska did not limit the power of Congress to reserve jurisdiction in Section 4 of the Statehood Act	34
B. Other matters mentioned in the opinion do not support the result	37
Conclusion	40
Appendix A	41
Appendix B	45

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CITATIONS

Cases: Page

Alaska Pacific Fisheries v. *United States*, 248 U.S. 78... 5, 7, 14, 22, 28, 30, 33, 37, 38
Aleut Community of St. Paul Island v. *The United States*, 127 C. Cls. 328... 16
Beecher v. *Wetherby*, 95 U.S. 517... 23
Board of Comm'rs v. *Seber*, 318 U.S. 705... 27
Boeing Aircraft Co. v. *Reconstruction Finance Corp.*, 25 Wash. 2d 642, 171 P. 2d 838, appeal dismissed, 330 U.S. 803... 36
Coyle v. *Oklahoma*, 221 U.S. 559... 5, 26-27
Dow v. *Ickes*, 123 F. 2d 909... 17
Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99... 28
Hynes v. *Grimes Packing Co.*, 185 F. 2d 338... 33
Hynes v. *Grimes Packing Co.*, 337 U.S. 86... 5, 7, 14, 15, 17, 21, 22, 23, 26, 33-34, 37
Ketchikan Packing Co. v. *Seaton*, 267 F. 2d 660... 8, 25
Miller v. *United States*, 159 F. 2d 997... 14, 19
Montana Power Co. v. *Rochester*, 127 F. 2d 189... 28
Moore v. *United States*, 157 F. 2d 760... 28
Shively v. *Bowlby*, 152 U.S. 1... 16, 28
Sioux Tribe of Indians v. *United States*, 316 U.S. 317... 23, 28
Sutter v. *Heckman*, 1 Alaska 81... 16
Taylor v. *United States*, 44 F. 2d 531... 28
Tee-Hit-Ton Indians v. *United States*, 132 C. Cls. 624... 15, 19
Tee-Hit-Ton Indians v. *United States*, 348 U.S. 272... 14-15, 22, 23, 34, 38
Tlingit and Haida Indians of Alaska v. *United States*, 177 F. Supp. 452... 18, 38
United States v. *Forness*, 125 F. 2d 928... 32
United States v. *National Gypsum Co.*, 141 F. 2d 859... 32
United States v. *Romaine*, 255 Fed. 253... 28
United States v. *Sandoval*, 231 U.S. 28... 5, 27
United States v. *Santa Fe Pacific R. Co.*, 314 U.S. 339... 23
Ward v. *Race Horse*, 163 U.S. 504... 29-30, 37
Williams v. *Lee*, 358 U.S. 217... 27

Constitutions, Statutes and Regulations:

U.S. Constitution, Fifth Amendment... 14
Alaska Constitution, Article VIII, Section 15... 37
Act of May 1, 1956, 49 Stat. 1250... 38
Alaska Omnibus Act of June 25, 1959, 73 Stat. 141... 10, 44

Constitutions, Statutes and Regulations—Continued

	Page
Alaska Statehood Act, 72 Stat. 339:	
Section 1	41
Section 4	2, 3, 4, 5, 8, 9, 11, 12, 20, 21, 22, 23, 25, 26, 34, 36, 41
Section 6	26
Section 6(e)	7, 8, 43
Section 6(m)	30
Section 8(d)	36
Oklahoma Statehood Act, 34 Stat. 267	29
Special Jurisdictional Act of June 19, 1935, 49 Stat. 388	18
Statehood Act of Montana, North Dakota, South Dakota and Washington, 25 Stat. 676, Section 4	29
Statehood Act for New Mexico and Arizona, 36 Stat. 557	29
Submerged Lands Act, 67 Stat, 29, 43 U.S.C. 1311–1315	30
Utah Statehood Act, 28 Stat. 107	29
Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461	38
White Act of June 6, 1924, 43 Stat. 464	7, 17
As amended, 44 Stat. 752, 48 U.S.C. 221	25, 26
25 C.F.R. Part 88	8
25 C.F.R. 88.1	24
25 Fed. Reg. 3079	8, 24
25 Fed. Reg. 4864–6	8, 24
26 Fed. Reg. 7064	8
Miscellaneous:	
Cohen, *Handbook of Federal Indian Law* (Dept. of Int., 1942)	32–33
Federal Indian Law (Dept. of Int., 1958)	33, 38
Hearings before the Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess	18–19
H. Rept. No. 88, 84th Cong., 1st Sess	19
H. Rept. No. 624, 85th Cong., 1st Sess	19, 20
H. Rept. No. 369, 86th Cong., 1st Sess	21
Inventory Reports of Real Property Owned by the United States Throughout the World (General Services Administration, 1959)	21
S. Rept. No. 1163, 85th Cong., 1st Sess	19, 20
S. Rept. No. 331, 86th Cong., 1st Sess	21

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v.

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INTEREST OF THE UNITED STATES

When these cases were previously before this Court (363 U.S. 555), the views of the Solicitor General, on behalf of the United States, were stated to the Court, and the position of the United States was also presented to the Supreme Court of Alaska when it later

heard the case. The primary interest of the Federal Government arises out of its special and continuing relationship to Indians, including the Indians of Alaska, as well as the particular responsibilities laid upon the Federal Government, with respect to Indians in Alaska, by Section 4 of the Alaska Statehood Act. That is the dominant reason for our participation in this case in support of the appellants. But the Federal Government, as represented by the Department of Justice, also has a subsidiary (but not inconsistent) concern—to present the reasons for our view that appellants' (and comparable) fishing rights are not "vested" or compensable under the Fifth Amendment so that, if those rights are held (contrary to our view) to have been terminated by the Statehood Act or the admission of Alaska as a State (or if they are subsequently ended by Congress or the Executive), there can be no constitutional or statutory claim against the United States for just compensation. We do not believe that this subsidiary position is at all inconsistent with our primary concern to support the Indians against the State of Alaska, or that the Court need pass in this case upon the validity of our subordinate contention, but we think it appropriate to set it forth so that there be no misunderstanding, in this or other litigation, as to our stand if and when the issue of compensability should become relevant.

SUMMARY OF ARGUMENT

The Supreme Court of Alaska has rejected appellants' claim that the Alaska fish trap legislation was not intended, as a matter of State law, to apply to

appellants. There still remain the federal issues mooted before this Court at the 1959 Term, and on those questions the opinion of the court below has not caused any change in the position of the Federal Government in support of appellants. We first restate that position, and then respond to the novel reasons advanced by the Alaska Supreme Court for holding against appellants.

I

Section 4 of the Alaska Statehood Act provides for a disclaimer by the State of all right and title to lands or property, including "fishing rights", held by Indians or other natives (or by the United States in trust for them), and also that these interests are to remain under the "absolute jurisdiction and control" of the Federal Government until disposed of under its authority. Under these provisions, Alaska lacks jurisdiction to require the elimination of the appellants' fish traps because the Federal Government retains all rights of regulation and control.

1. Read against the historical and legislative background, the term "fishing rights"—which was specially added late in the consideration of the bill—in Section 4 is broad enough to cover appellants' fishing interests, whether they be vested and compensable as against the United States (as has been asserted), or merely discretionary with the Federal Government (as we believe). Congress was aware of the prior judicial history in which comparable interests had been characterized as "rights" in the very opinions which held them not to be vested but subject to full

regulation by the United States; Congress was also aware of claims that certain Indian rights in Alaska were vested. In these circumstances, Congress made it plain that it did not desire to disturb the status quo, but that the aim of Section 4 was to preserve the situation as it was—including, we believe, continued federal control over Indian fishing.

If the term "fishing rights" (as well as the term "property") in Section 4 were confined to rights vested as against the United States, the Indian portion of Section 4 would, in our view, lose all meaning and effect. The only two Indian reservations in Alaska—the Metlakatla and Karluk reservations—are clearly not of the vested type; and in our opinion no communal Indian rights in the State fall into that category. The result would be that both Congress and Alaska would have adopted a useless, or almost useless, provision. More than that, the status quo would be gravely disturbed, contrary to the Congressional purpose, by the abolition on statehood of the only two Indian reservations in Alaska.

The nub of it is that the terms "property" and "fishing rights" in Section 4 do not refer to the character of the Indian interest *as against the United States,* but only with respect to third parties. As to the latter, those interests are clearly "property" and "rights"—whatever their status vis-a-vis the Federal Government.

2. At the same time, we note expressly that in our view the Statehood Act did not vest, grant, or recognize any Indian rights as compensable against the United States, and that prior to statehood those rights

were not vested or compensable. Both the terms of Section 4 (particularly the first proviso) and its history show that Congress so understood the position of the Federal Government and wished to leave the matter in status quo.

3. The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with the "equal footing" to which Alaska is entitled. Even after admission of a State, Congress retains power to deal with Indian matters within the State under its powers over Indian commerce and public lands (see *Coyle* v. *Oklahoma,* 221 U.S. 559, 570, 594; *United States* v. *Sandoval,* 231 U.S. 28, 38); that authority has long been recognized and exercised. Under these granted powers, Congress could have formally created temporary Indian reservations preserving appellants' fishing rights, but the same grant also authorized the lesser reservation of power to regulate and control.

II.

The novel bases of the decision of the Supreme Court of Alaska are erroneous.

1. Despite the doubts of that court, it is settled that the federal Indian power extends to Alaska and its Indians, both prior to statehood and now. See, *e.g., Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86.

2. The court thought Section 4 of the Statehood Act invalid and inoperative because in the court's view it conflicted with or did not meet the require-

ments of the proposed constitution for Alaska adopted in 1956. The short answer is that, both by its terms and under the admission procedure, Section 4 was controlling and the State constitution was automatically amended on statehood to accord with Section 4.

3. Various other erroneous considerations were taken into account in the opinion below. In particular, the court erred in assuming (a) that appellants are not true Indian communities subject to the aid and protection of the Federal Government, and (b) that fish traps are necessarily destructive of conservation interests.

ARGUMENT

When these cases were here before, the Court envisaged the possibility that the Supreme Court of Alaska might interpret the Alaska fish trap legislation as not affecting these appellants—thus avoiding constitutional and other federal issues (363 U.S. at 561-2). That has not come to pass. The Alaska court has squarely applied the State statutes to the appellants, and has reached and decided significant federal questions. We find nothing in the court's opinion on these issues requiring us to change our position, as presented to the Court at the 1959 Term. In Point I, we re-state our position as previously advanced. In Point II, we consider the new arguments proffered by the Supreme Court of Alaska.

I.

THE STATE OF ALASKA LACKS JURISDICTION TO REQUIRE THE ELIMINATION OF THE APPELLANT INDIANS' FISH TRAPS

We fully agree with the basic position of appellants that officials of the State of Alaska are not authorized to prohibit operation of the appellants' 11 fish traps.

A. *Introduction.*

Fishing has always been a matter of predominant importance to the natives of Alaska, as well as to the non-native inhabitants, as this Court has more than once recognized. See *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86. Prior to the admission of Alaska as a State, commercial fishing in the Territory was regulated, not by the Territorial Government, but by the Federal Government under the White Act of June 6, 1924, 43 Stat. 464. The Secretary of the Interior, charged with administering that Act, did not prohibit fish traps but did regulate their use both by natives and by others. As of the date of admission, the appellants had 11 authorized traps.

Upon Alaska's admission in January 1959, the legal situation changed. Section 6(e) of the Statehood Act (App. A, *infra,* p. 43) provided that "the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws" until the elapse of a specified period "after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the adminis-

tration, management, and conservation of said resources in the broad national interest." Under this authorization—and implementing the provisions of the Alaska Constitution barring fish traps—the Secretary prohibited, during the year 1959, the use of fish traps (*except for the appellants*) by commercial fishermen in Alaskan waters. See *Ketchikan Packing Co.* v. *Seaton,* 267 F. 2d 660 (C.A.D.C.). In the early part of 1959, Alaska adopted legislation dealing with its fish and wildlife resources, and the Secretary (on April 27, 1959) made the certification contemplated by the proviso in Section 6(e) of the Statehood Act. On January 1, 1960, under this proviso, the State assumed general regulatory authority over fish and wildlife and the power of the Federal Government under the proviso was no longer effective. The general control of fishing in Alaska passed to the State.

The Secretary continued, however, to assert his authority over the use of fish traps by appellant Indians. In the spring of 1960, he promulgated regulations permitting them to operate 11 fish traps, and this permission has been continued. 25 C.F.R. Part 88; 25 Fed. Reg. 3079, 4864–6; 26 Fed. Reg. 7064. As the prime basis for his action, the Secretary relied on Section 4 of the Statehood Act (App. A, *infra,* pp. 41–42), which is permanent legislation dealing with "any land or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives." The issues now remaining in this litigation

hinge upon the proper interpretation of this phase of Section 4, and upon its validity.

B. *Control over Indian fishing was reserved to the United States under Section 4 of the Alaska Statehood Act.*

The full text of Section 4 (before amendment by the Alaska Omnibus Act of 1959) is as follows (App. A, *infra*, pp. 41–42):

> SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that [all such lands or other property, belonging to the United States or which may belong to said natives], shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this

> Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions or alienation. [Brackets added.]

By the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, the words we have bracketed in Section 4 were stricken, and there was substituted the words: "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives" (App. A, *infra*, p. 44).[1]

In our view, the correct construction of this Section is that the federal right over and power to control Indian lands, fisheries, and other interests were preserved in status quo, just as they had been prior to statehood. There was neither relinquishment of rights and a grant to the State (as it contends), nor

[1] It is plain, we believe, that the addition of "including fishing rights," was merely a correction and clarification of the original intent of Section 4, and not a true change or addition. See also *infra*, p. 21, fn. 6.

was there a recognition or grant of rights to the Indians as against the United States. Preservation of that existing situation unchanged was not, we believe, inconsistent with equal footing or with the Submerged Lands Act. But preservation of the existing situation does mean that the Federal Government continues to have exclusive control over Indian fishing in Alaska.

1. The precise terms of Section 4 (as amended in 1959), as they bear on the Alaska Indians, deserve careful analysis because those terms embody the exact powers retained by the Federal Government in this field. The statute first provides that "as a compact with the United States" the State disclaims all right and title to *"any lands or other property (including fishing rights)*, the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands *or other property (including fishing rights)*, the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the *absolute jurisdiction and control of the United States* until disposed of under its authority * * *" (emphasis added). But the Section immediately goes on, in its first proviso, to provide explicitly that the Statehood Act shall not in any way affect, for or against the claimants, "any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto". The proviso then emphasizes its purpose to leave all pre-existing claims totally unaffected by the State-

hood Act by declaring that nothing in the Act should be read to authorize, establish, recognize, or confirm the validity or invalidity of any such claim.

Our reading of Section 4, in the light of this first proviso (which was added at the request of the Department of Justice), is (a) that Congress retained in the Federal Government, for the future, "absolute jurisdiction and control" over all Indian fishing, whether or not those "fishing rights" could be considered compensable "property" in the conventional sense, but (b) that Congress did not wish to take any stand whatever with respect to claims against the United States by Alaska Indians that they had compensable property, including compensable fishing rights, of which they could not be deprived without compensation. In other words, where money was involved—*i.e.*, "claims" against the Federal Government—Congress deliberately intended to leave matters in status quo, and made no grant or confirmation to the Indians. Where money was not involved—"absolute jurisdiction and control" over Indian fishing from the viewpoint of regulation—Congress deliberately intended to keep full control in the Federal Government (*i.e.*, under the protection of the Interior Department) over Indian "fishing rights" (rather than to vest control in the State), whether or not those "fishing rights" rose to the dignity of compensable rights or were mere privileges accorded by the Federal Government in its discretion. The "fishing rights" of which Section 4 speaks need not be true vested property rights—and, in our view, were not—but they are fishing privileges, or "rights" in a

broader sense, subject to regulation and control by the Federal Government. By the same token, other Indian "property" or "land", as those terms are used in Section 4, need not be land or property to which the Indians have vested rights against the United States.

2. That appellants' "fishing rights" are covered by Section 4 whatever their character—a reading which is certainly consistent with the face of the language Congress used—seems to us to become plain when one considers the Alaskan Indian background and the legislative history of the Statehood Act.

(*a*). There is nothing in the bare words "fishing rights" to prevent the fishing rights or privileges enjoyed for years by appellants prior to statehood, even though non-compensable, from being characterized as fishing "rights", and even as "property", under Section 4. Those general terms are not necessarily limited to interests which are vested so that they cannot be destroyed without compensation; rather, ambiguous words such as these take their meaning from the context, as well as the background and purposes of the particular legislation in which they appear. With respect to the Alaskan Indians, their fishing and comparable interests have often been called "rights" by the very opinions which hold them *not* to be vested; see the use of the word "right" or "rights" in the cases discussed *infra*, pp. 14–17.

(*b*). Congress's pre-statehood treatment of the Alaska Indians shows that by the terms "fishing rights" and Indian "property" in Section 4 it must

have meant the interests of these appellants. No other type of Indian "rights" existed in Alaska, and non-compensable interests like the appellants' were frequently referred to as "rights" in the prior judicial history.

The United States has never, by treaty or agreement, established permanent homes—*i.e.*, created "recognized Indian title"—for any of the Alaskan natives. In two instances—those involved in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, and *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86—reservations, including adjoining fishing waters, have been set aside for the temporary use of the appellants in No. 2 (the Metlakatla) and for the Native Village of Karluk. In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, this Court held that an alleged taking of "unrecognized" Indian title from Alaskan natives was not compensable under the Fifth Amendment "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States * * *" (348 U.S. at 285).[2] This decision further rejected the claim (which had been sustained by the Court of Appeals for the Ninth Circuit in *Miller* v. *United States*, 159 F. 2d 997) that statutes of 1884 and 1900—providing (in general) that natives in Alaska should not be disturbed in their possession of land actually

[2] It is of interest that the *Tee-Hit-Ton* opinion describes the government's position in that case as follows (348 U.S. at 277):

> The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' *property* interest, if any, is merely that of the *right* to the use of the land at the Government's will; * * *. [Emphasis added.]

occupied by them—were a recognition of a right of permanent occupancy. The Court repeated the distinction, strongly emphasized in the *Hynes* case,[3] between permissive occupation and a grant of vested rights and held that in the federal statutes "what was intended was merely to retain the *status quo* until further congressional or judicial action was taken" (348 U.S. at 278). The Court went on to say that "[t]his policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 * * *" which authorized the action alleged in the *Tee-Hit-Ton* case to constitute a taking. Subsequently, the Court of Claims dismissed another petition of the Tee-Hit-Tons seeking recovery for the alleged taking of an exclusive right of fishing. *Tee-Hit-Ton Indians* v. *United States,* 132 C. Cls. 624. After referring to the materials on which the Indians relied to establish a private exclusive right of fishing, the Court of Claims said (pp. 625–626):

> According to the present law, such a right could not be acquired, even by a purported grant from the Executive. The Act of June 6, 1924, 43 Stat. 464, "For the Protection of the Fisheries of Alaska," provides in Section 1 that

[3] In *Hynes* (337 U.S. at 103), the opinion described the situation as follows:

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such *rights* may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. [Emphasis added.]

> "no exclusive or several right of fishery shall be granted" in Alaskan waters.

And after citing *Shively* v. *Bowlby*, 152 U.S. 1, and *Sutter* v. *Heckman*, 1 Alaska 81, the court concluded (pp. 626–627):

> If we, as the plaintiff's quoted authority says we must do, indulge every presumption against the supposition that at some time in the remote past a grant was made, though the evidence of it has been lost, this is no case for prescription, since those familiar with the history of the times say it was contrary to the policy of the Government to make such grants.

A year earlier, the Court of Claims had dismissed a petition seeking recovery for the alleged taking of the right of an Alaskan group to take seals. *Aleut Community of St. Paul Island* v. *The United States*, 127 C. Cls. 328. The court held (pp. 334–335):

> Whatever rights the Aleuts had to take seals in the waters off St. Paul Island under Russian dominion, there can be no doubt that upon acquisition of that territory by the United States their *right* to do so was subject to the paramount power of the United States to regulate and control it. [Emphasis added.]

It then concluded, referring to the various Acts of Congress relating to seal fishing (pp. 335–336):

> Under these Acts, the only *right* plaintiff had to kill seals was the *right* to kill them for food and clothing and for use in the manufacture of small boats, and for the benefit of the United States. The Government had the right to prohibit altogether plaintiff from engaging in sealing and, hence, had the right to permit it to do

> so only on the conditions imposed. When plaintiff killed seals it killed them for the benefit of the United States and with knowledge that the United States would sell the skins and put the proceeds of sale in its own treasury. Seals killed by the natives were Government seals. [Emphasis added.]

Concerning alleged exclusive rights of fishing, the Court, in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, held that the White Act of June 6, 1924, 43 Stat. 464, under which the Secretary of the Interior regulated commercial fishing in Alaska, could not be used to enforce an exclusive right of fishing and that the enforcement provisions of that Act could not be used to implement the Executive Order issued under another statute which created the Karluk Reservation and its fishing rights. However, the Court did approve (fn. 53, p. 123) *Dow* v. *Ickes*, 123 F. 2d 909 (C.A. D.C.), which sustained the permission given by the Secretary for trap fishing at certain locations.

In summary, our view is that, at the time of passage of the Alaska Statehood Act, the general policy of Congress had not been to create vested rights of fishing in Alaska but had been to permit trap fishing by particular fishermen (including Indians)—*i.e.*, Congress had authorized the award of noncompensable "fishing rights." Permanent rights for Indians, either in lands or in fishing rights, had never been created by treaty, agreement, recognition of "original Indian title," or otherwise. Two temporary reservations, especially of waters adjoining the lands for fishing purposes, had been created for the Metlakatla (appellants in No. 2) and one other group.

And Congress had clearly protected the natives' actual possession pending further Congressional action.[4]

(*b*). Our construction of Section 4, as referring to appellants' non-compensable interests when it uses the term "fishing rights," accords with the intent of Congress, as shown by the legislative history of that Section. In Hearings before the Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess., the subject of native rights was considered from many aspects (*e.g.*, pp. 122, 135, 137). The nature of pending cases, including the Court of

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[4] One further factor requires mention. Under a Special Jurisdictional Act of June 19, 1935, 49 Stat. 388, the Tlingit and Haida Indians of Alaska filed suit in the Court of Claims to recover for the alleged taking of Indian title to "southeastern Alaska, lying east of the one hundred and forty-first meridian." The Court of Claims held (in October 1959) that they were entitled to recover for the taking, or for the failure of the United States to prevent others from taking, rights of these Indians to some 20,000,000 acres of land and adjacent waters in Alaska. *Tlingit and Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452. The first action of the United States said by the Court of Claims to be a taking from the Tlingit and Haida Indians was the establishment of the Metlakatla Reservation here involved (*id.*, p. 467). The Court of Claims said that the "most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others" (*id.*, p. 468). The case was ordered to be tried on the issue of amount of damages.

We by no means agree with this interlocutory decision on the issue of liability but considered it inappropriate to seek review by this Court since the issue as to amount of damages has not been determined and that determination may well influence the question whether the case is important enough to warrant review by this Court.

Claims *Tlingit* case, mentioned ~~below~~ above (fn. 4), was explained (pp. 206 *et seq.*). The then pending *Tee-Hit-Ton* case (*supra*, pp. 14–15) was discussed (p. 210), as were the *Hynes* case and the Ninth Circuit *Miller* case (pp. 211–216), *supra*, pp. 14–15, 17. See also *id.*, pp. 231–235, 260–268, 284, 293, 339.

The House Committee in the 84th Congress (H. Rept. No. 88, 84th Cong., 1st Sess.) said (p. 47): "It is provided that no attempt will be made to deal with the legal merits of the indigneous rights but to leave the matter in status quo for either future legislative action or judicial determination." The House Committee in the 85th Congress, 1st Sess. (H. Rept. No. 624, p. 19) repeated this statement of the purpose of Section 4 and the proviso. The Senate Committee expressed the same thought in more detail, saying (S. Rept. No. 1163, 85th Cong., 1st Sess., p. 15):

> * * * The bill in its present form does not and is not intended to change or affect the laws of the United States relating to jurisdiction over Indian or native lands.
>
> The first proviso of section 4 directs that nothing contained in the act shall be construed to affect the existence or validity of any claim against the United States nor be construed as an interpretation of the meaning or application of any Federal law pertaining to such claims. The purpose of the proviso is to leave the legal question as to the existence or validity of any claim against the United States, including native claims, in exact status quo, and to leave the question for subsequent legis-

lation or judicial decision without expressing any opinion or mandate in this act.

The second proviso includes within the compact a stipulation that the State shall not impose taxes on property of the United States or native property except to the extent authorized or to be authorized by Congress, but the restriction on taxation does not apply to property held by individual natives in fee without restrictions on alienation. This proviso expresses existing law as it applies within the States and is not intended to effect any change in such law.

Moreover, Congress did add the phrase "(including fishing rights)," over the objections of the Department of Justice (which feared that the phrase might raise an implication that these Indian fishing "rights" were compensable rights).[8] As we have suggested, *supra*, pp. 12–13, this added phrase can properly be read, together with the proviso to Section 4, as making sure that the Federal Government would retain control over Indian fishing, and not as endowing these "fishing rights" with the character of compensable property. For it is indisputable from the legislative history summarized above that Congress was fully informed as to the differences of view as to native rights in Alaska and expressed, in every possible way, its intent to preserve the status quo—including federal control over Indian fishing

[8] See H. Rept. No. 624, 85th Cong., 1st Sess., p. 31; S. Rept. No. 1163, 85th Cong., 1st Sess., at p. 47.

in Alaska. No reason appears why the Act should not be interpreted to give effect to that intent.[6]

3. It is suggested by the court below and by the State that the admission of Alaska abolished the Metlakatla Reservation or at least that part extending 3,000 feet from land.[7] If the phrase in Section 4, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives," is read to mean property to which the Indians have *vested rights* as against the United States, like treaty reservations or recognized Indian title, then it would follow under the State's contention that the Metlakala and Karluk reservations had been abolished by creation of the State. But such a construction is precluded by the fact that it would simply

[6] The amendment of Section 4 by the Alaska Omnibus Act was made, in part, to make sure that the provision "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States" would not be interpreted to apply to lands of the United States in Alaska other than those used by natives. The importance of this limitation is emphasized by the fact that, as of June 30, 1959, the United States owned 99.1 percent of the land in Alaska. (See Inventory Reports of Real Property Owned by the United States Throughout the World (General Services Administration, 1959).) If the new State had no criminal or civil jurisdiction over the vast area, its authority would be very severely limited. See S. Rept. No. 331, 86th Cong., 1st Sess., p. 9; H. Rept. No. 369, 86th Cong., 1st Sess., at p. 6.

[7] The suggestion that the Proclamation reserving the waters became void after statehood for lack of definiteness plainly lacks merit in view of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 113–114.

read this provision out of the Act—since it would not and could not apply to any property in Alaska (see *supra*, pp. 14–18)—and would also mean that Congress had been performing vain acts in inserting the proviso in Section 4 (*supra*, pp. 9–10) and in revising the language of that Section in the Alaska Omnibus Act of 1959, *supra*, pp. 10, 21, so as to clarify the original intent. That amendment emphasizes the original language of Section 4 that "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority."

The basic argument, premised on the bare word "property," is that only technical vested property rights, valid as against the United States, are preserved in status quo and that, therefore, the temporary withdrawals in *Hynes* v. *Grimes Packing Co.*, *supra*, and *Alaska Pacific Fisheries*, *supra*, were automatically canceled upon admission of the State. This is a denial of the whole course of history in dealing with Alaskan Indian lands and waters, as well as the intention of Congress and the people of Alaska in connection with admission of the State to the Union.[*] Abolition of the only two Indian reservations in Alaska cannot be called preservation of the status quo.

The argument also ignores the fact that "property" has a different meaning when rights as against the United States are concerned and when rights as against others are involved. Thus, in *Tee-Hit-Ton*, *supra*, p. 285 the only holding was that original Indian title "creates no rights against taking or extinction by

[*] See also *infra*, pp. 31–34, 36–37.

the United States protected by the Fifth Amendment or any other principle of law." The same is true of reservations created by Executive Order. *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317. *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, holding that the Indian occupancy was to be respected until extinguished by the United States, makes the distinction clear between rights as against others and as against the United States. This distinction was again emphasized in *Hynes* v. *Grimes Packing.*

For these reasons, we contend that Section 4 continues federal control over appellants' fishing even though "fishing rights" are neither vested nor compensable as against the United States. But we also believe that it is unnecessary for the Court in this suit to decide or consider the rights of the Indians vis-à-vis the United States. So far as the State of Alaska is concerned, the result of the litigation must be the same whether the appellants' fishing rights are vested or not. A discussion of rights as between the United States and the natives should be rejected here for the same reason that the argument by the third party was rejected in *Beecher* v. *Wetherby,* 95 U.S. 517, repeated in *Tee-Hit-Ton,* where, concerning Indian occupancy, the Court said (p. 525):

> It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter

open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

4. On the other hand, as indicated above, we feel that we should make it plain that we cannot agree that the Statehood Act vested, granted, or recognized any rights compensable against the United States. Rather, as we have said, we think that the Act referred to those rights of temporary possession, until the United States should act otherwise, which were being exercised, especially by means of appellants' fish traps, at the time of the passage of the Act and the admission of Alaska to the Union.

Nor can we agree with any implications in the phrases, in the proposed Indian fishing regulations published by the Interior Department on April 9, 1960, 25 Fed. Reg. 3079—referring to appellants' "fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq. [the White Act], other Federal statutes, regulations and customs; and which were secured to the Alaska Eskimos, Indians and Aleuts by section 4 of the Alaska Statehood Act", and characterizing the proposed regulations as "declaring existing fishing rights of Indians in Alaska"*—insofar as these terms may tend to imply that appellants' fishing "rights" are in any way vested or protected as against action by the Federal Government, or legislatively "recognized" as against the Federal Government, so as to be immune from alteration or abolition without payment of compensation.

*See also 25 Fed. Reg. 4864, and 25 C.F.R. 88.1.

Similarly, we do not believe that Section 4 of the Statehood Act—in retaining "absolute jurisdiction and control" in the United States over Indian property, including fishing rights—made it mandatory for the Secretary of the Interior to continue to grant fish-trap privileges to appellants.[10] Our position is that under Section 4 of the Statehood Act the Secretary has full discretionary authority, pursuant to the White Act, 44 Stat. 752, 48 U.S.C. 221, to regulate and control Indian fishing in Alaska; he is no more compelled to permit the use of fish-traps in 1962 than he was in 1959 (see *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (C.A.D.C.)), but he has the power to do so if he chooses. The Secretary has full authority to do what he considers proper for the protection of Indian fishing rights,[11] including enlargements of fishing rights beyond those now enjoyed, subject to his consideration of other pertinent factors, including conservation.

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[10] A press release issued by the Interior Department on April 7, 1960, in connection with the publication of the proposed regulations, seems to assume that the Secretary is *required* to permit these fish-traps, that he has no discretion to decide against their use in 1960 or thereafter, and that only Congress can decide to do away with the use of fish-traps by appellants. As indicated in the text, *supra*, we do not agree with these assumptions and have so informed the Department of the Interior. We may add that, in our view, the Department of Justice has never advised the Interior Department that the Secretary has no alternative but to permit the appellants to operate their traps if they choose to do so, or that only Congress can abolish the use of fish-traps by appellants.

[11] The views of the Department of the Interior on the rights of the Indians and the duties of the Secretary are set forth in Appendix B, *infra*, pp. ~~45-49~~. That Department still adheres to those views. 45-49

Conversely, if the Secretary does elect to permit the use of fish-traps by appellants, in 1962 or future years, he will not be acting contrary to the White Act's proviso against the grant of an exclusive right of fishery (see *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116–123).[12] By virtue of Sections 4 and 6 of the Alaska Statehood Act, the White Act can apply, from 1960 onward, only to Indian fishing in Alaska—control over non-Indian fishing now being lodged wholly in the State—and the Secretary's decision to allow Indians to use fish-traps would not discriminate against any person now subject to the White Act. The separate treatment accorded appellants (as compared to non-Indian fishermen) stems, not from any grant to appellants of an exclusive or special right under the White Act, but simply from the fact that the Act now applies only to Indian fishing. There is no discrimination or special treatment under the White Act as it now exists.

C. *The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with "equal footing" or with the Submerged Lands Act.*

1. The basic case of *Coyle* v. *Oklahoma*, 221 U.S. 559, recognized that "equal footing" does not prevent

[12] This proviso read as follows:

Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. * * *

reservation of federal power as to matters which are within the constitutional powers of the Federal Government; the Court made reference (pp. 570, 574) to the power to regulate commerce among the States and with the Indian tribes and also public lands. See also *United States* v. *Sandoval*, 231 U.S. 28, 38. Since the authority over Indians arises from the commerce clause and the treaty and war-making powers, as well as from the control of disposition of federal property,[29] its exercise is not and cannot be limited simply to reserving lands for Indians. Because of the history of federal-Indian relations, and because of the geographic situation in continental United States, that control was exercised, first, in terms of reserving areas for use by the Indians to the complete exclusion of whites and of state law, and, later, to modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. See *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 716, where the Court summarized the history and stated that, "The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Cf. *Williams* v. *Lee*, 358 U.S. 217. The power has not rested on any considerations of the principles of property law or of the existence of rights—legal, equitable or moral—in particular lands.

[29] As to the various sources of the "federal power to regulate and protect the Indians and their property against interference even by a state", see *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 715.

Thus, while the Indians have no such right as against the United States in lands temporarily set aside for their use, such as reservations created by Executive Order, *Sioux Tribe* v. *United States*, 316 U.S. 317, this Court has never held that this circumstance diminishes the federal power to regulate such Indians or permits application of conflicting state law. Cf. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99.

When dealing with Indians in the northwestern United States where fishing, especially in tidal waters, was of great concern and required protection to promote the welfare of the Indians, the courts have recognized that such compelling circumstances may produce an exception to the results that might otherwise follow from admission of a State to the Union. Although it is often said that tidelands in territories are held in trust for future states and that title thereto vests in the State upon admission, that is not the result when a reservation has been created for Indians prior to statehood. *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9), so held in concluding that the State of Washington's fishing regulations did not extend to tidelands of the Quillayute Indian Reservation.[14] In *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, this Court said (pp. 87–88):

> That Congress had power to make the reservation inclusive of the adjacent waters and sub-

[14] See, also, *Shively* v. *Bowlby*, 152 U.S. 1, 48, 57–58; *Taylor* v. *United States*, 44 F. 2d 531, 533 (C.A. 9); *Montana Power Co.* v. *Rochester*, 127 F. 2d 189, 191 (C.A. 9); *United States* v. *Romaine*, 255 Fed. 253, 259 (C.A. 9).

merged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton*, 101 U.S. 129, 133; *Shively* v. *Bowlby*, 152 U.S. 1, 47–48, 58; *United States* v. *Winans*, 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama*, 118 U.S. 375, 379, *et seq.*; *United States* v. *Rickert*, 188 U.S. 432, 437.

It is clear that rights to the fishing sites here concerned could have been specifically reserved by Congress through creation of a temporary Indian reservation, regardless of whether permanent beneficial rights might be later vested in the Indians. See, *e.g.*, Section 4 of the Statehood Act for Montana, North Dakota, South Dakota, and Washington, 25 Stat. 676, 677; Utah Statehood Act, 28 Stat. 107, 108; Oklahoma Statehood Act, 34 Stat. 267, 270; Statehood Act for New Mexico and Arizona, 36 Stat. 557, 558–559, 569–570. It follows, we believe, that the comparable reservation of power to control and regulate Indian fishery may constitutionally be reserved, and that this is what was done with respect to Alaska. The specific reservation in Section 4 of the Alaska Statehood Act is the reason *Ward* v. *Race Horse*, 163 U.S. 504, is irrelevant here; in that case,

the Statehood Act contained no such specific reservation. See 163 U.S. at 511.

2. What we have said disposes likewise of any contention based on the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1311–1315, which specifically excepts from State authority "lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians" (43 U.S.C. 1313 (b)). The Submerged Lands Act is specifically referred to in Section 6(m) of the Alaska Statehood Act, which says that Alaska "shall have the same rights as do existing States thereunder." Certainly, Congress saw no conflict between that Act and the reservation of control over Indian fisheries in Section 4 of the Statehood Act.

II.

THE BASES OF THE DECISION OF THE SUPREME COURT OF ALASKA ARE ERRONEOUS

The opinion of the Supreme Court of Alaska did not undertake to prove that appellants are wrong if one accepts the assumption that the intention of Congress in the Statehood Act is to be given effect. Instead the court considers that the admission of Alaska, regardless of the intent of Congress, *necessarily* abolished many existing rights, including even the Metlakatla reservation which was sustained by this Court in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78. The reasoning of the opinion is contrary to history, as explained in the opinions of this

Court, as well as to the explicit language of the Statehood Act.

A. *Congress had power to reserve federal jurisdiction over Alaska native fishing, and did so in Section 4.*

Although, as we have shown in Point I, *supra*, pp. 9 *ff*, the intent of Congress was to preserve the status quo as to native rights in Alaska, the Alaska Supreme Court has now held, in effect, that Congress had no power to do so. As a consequence, the decision renders totally ineffective this part of Section 4 of the Alaska Statehood Act, especially the reference to "fishing rights." It states (Opinion 25):[16] "We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States * * *." This conclusion errs in two basic particulars.

1. *The federal Indian power extends to Alaska.*— The opinion discusses the history of Alaskan natives at length, compares actions taken in Alaska with those in New Mexico with relation to the Pueblo Indians (Opinion 32–35), asserts that the natives here have never "been treated as wards of the United States" (Opinion 36–38), claims that "Congress has never maintained any guardianship over Alaska Indians" (Opinion 39–40), and concludes that no federal authority over Alaskan natives survived statehood. This discussion confuses fundamental power with its exercise. Different local problems create many differences in the manner in which the federal Indian authority is exercised. And lack of complete exercise

[16] The Appendix to the 1961 Statement as to Jurisdiction, in Nos. 2 and 3, consists of the opinion of the Supreme Court of Alaska.

of a power in every instance does not negate the existence of that power or warrant the imposition of limitations upon it. Thus the fact that, in New York, the State has undertaken many of the functions which are exercised elsewhere by the United States does not detract from the federal authority to take appropriate action for the Indians' protection in that State. *United States* v. *Forness,* 125 F. 2d 928 (C.A. 2); *United States* v. *National Gypsum Co.,* 141 F. 2d 859 (C.A. 2). In *National Gypsum,* Judge Augustus Hand said (p. 863):

> For many years it has been the understanding of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.

The New York Indians, together with the Alaskan natives and the Pueblos of New Mexico, presented problems so different that they were treated in separate chapters in Cohen, *Handbook of Federal Indian*

Law (Dept. of Int., 1942, pp. 401–425); and in the revision, *Federal Indian Law* (Dept. of Int., 1958), they are treated in Chapter XI, entitled "Special Groups and Laws." But that does not negate the continuing existence of federal authority.

This Court confirmed the power to create the Metlakatla reservation, including the surrounding water, in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, applying the law relating to the public purpose (p. 88) "of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama*, 118 U.S. 375, 379, et seq.; *United States* v. *Rickert*, 188 U.S. 432, 437." The statement in the present case (Opinion 62) that "[w]hether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful" demonstrates that the Alaska court refuses to accept the *Alaska Pacific Fisheries* decision and is now suggesting, more than 40 years later, after heavy investments have been made and much reliance placed on it, that it should be overruled.

Nor is the statement (Opinion 59) that the effect of the Metlakatla statute "was to create the only exclusive right of fishery ever to exist in Alaskan waters" accurate. That was the precise purpose of the order creating the Karluk Indian Reservation which this Court held valid in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, again applying the same principles as control Indian matters in other areas.[10] This Court there

[10] For the decree entered making the fishery exclusive, see *Hynes* v. *Grimes Packing Co.*, 185 F. 2d 338 (C.A. 9).

spoke (pp. 110–111) of "the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory" and proceeded to summarize some of that history, including the *Alaska Pacific case* (p. 114): "The conditions as to the waters around the Annette Islands closely parallel those of other Alaska areas actually occupied by natives." In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, this Court again applied to Alaska natives the same principles applicable to Indians in other areas, when the argument was advanced that a different rule should apply to Alaskan natives. The Court of Claims and the Court of Appeals for the Ninth Circuit have also assumed that the federal Indian power extends to Alaska (*supra*, pp. 14–18).

Since the existence of the federal Indian power in Alaska and its exercise in ways appropriate to the situation and the needs of the natives of Alaska is so clearly established by this Court, it seems unnecessary to document further this error of the Supreme Court of Alaska.[17]

2. *The proposed Constitution for the State of Alaska did not limit the power of Congress to reserve jurisdiction in Section 4 of the Statehood Act.*—The plain

[17] A closely related error of the Alaska Supreme Court is its claim (Opinion 24) that Congress has made no distinction in the past between Alaskan natives and whites. This is clearly refuted by the history we have outlined *supra*, pp. 14–18, as well as by the fact that Section 4 of the Statehood Act plainly rests on the assumption that distinctions between natives and others have been made in the past. If there were no such distinction, the terms of Section 4 would be meaningless. See *supra*, pp. 10 *ff.*

purpose of Congress, as expressed in Section 4 of the Statehood Act, has been frustrated by the following course of reasoning: (a) The Constitution resulting from the convention authorized by the Territorial Legislature in 1956 provided in Section 12 that the proposed State of Alaska disclaimed title to property including fishing rights which may be held by or for any Indian, etc., "as that right or title is defined in the act of admission" (Opinion 16); (b) that this Constitution "can be considered an offer" to which Section 4 of the Statehood Act was the response, thereby forming "a compact between sovereigns" (Opinions 16–17); (c) that (Opinion 18):

> A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the State was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition by defining the right or title;

(d) that no fishing rights, enforceable against the United States, were "held" by or for the natives at the time of statehood (Opinion 24) and (e) (Opinion 25):

> We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time.

The court's own recital of the process of admission of Alaska to the Union shows the fallacy of this reasoning. Regardless of the draft Constitution, Congress, after careful study over a period of years (see *supra*, pp. 18–21), stated the terms of admission in the Alaska Statehood Act. This was the "offer" that was made. Not only was ratification by the voters of Alaska required, specifically in proposition 3 (72 Stat. 343–4), to the reservation of rights and powers to the United States in Section 4 of the Act (Opinion 20), but also, in a provision not mentioned in the opinion below, it was provided (72 Stat. 339, 344):

> In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, *shall be deemed amended accordingly.* * * * [Emphasis added].

Section 4 of the Statehood Act thus controls, and the terms of the 1956 draft of the Alaska Constitution are plainly irrelevant.[18]

This error—the mistaken assumption that the State did not agree to any effective reservation favoring the Indians and did not change its Constitution accordingly—pervades the entire opinion. It is the basis of the refusal to recognize (Opinion 30–31) the

[18] Far from supporting the Alaska court's argument, *Boeing Aircraft Co.* v. *Reconstruction Finance Corp.*, 25 Wash. 2d 642, 171 P. 2d 838, appeal dismissed, 330 U.S. 803, dealing with the Washington Constitution, restated the basic principle: "the polestar in the construction of Constitutions is the intention of the makers and adopters."

clear distinction of *Ward* v. *Race Horse*, 163 U.S. 504, *supra*, pp. 29–30, in which the Wyoming Statehood Act contained no reservation comparable to Section 4. Ignoring the amendment of the 1956 Alaska Constitution as a result of the Statehood Act results in the mistaken charge (Opinion 45–46) that the Secretary of the Interior disregarded Article VIII, section 15, of the Alaska Constitution (prohibiting exclusive rights or special privileges of fishery) in permitting appellants to continue to use traps. This same error is the basis of the claimed violation of equal footing (Opinion 53) and of the Submerged Lands Act (Opinion 54)—both of which points assume the non-existence of any effective reservation in the Statehood Act —and it is again asserted, in discussing the Metlakatla situation, where the opinion speaks of "the affirmative duty imposed by the Alaska constitution [on Congress] to define any such reservations in the act of admission" (Opinion 60–61). All of these assertions are, we submit, fallacies resting on the erroneous foundation that the Indian portions of Section 4 never became effective.

B. *Other matters mentioned in the opinion do not support the result.*

1. The opinion emphasizes the importance of fishing to the economy of Alaska. As this Court has recognized in the *Alaska Pacific* and *Hynes* cases, fishing is of equal, if not greater, importance to the existence and development of the native communities. *Supra*, pp. 7, 14–15.

2. There is no true support for the apparent assertion (Opinion 38) that the appellant communities

were simply formed to secure the financial benefits of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461, and that they did not earlier exist in groups or villages. The true history detailed by this Court in the *Alaska Pacific Fisheries* and *Tee-Hit-Ton* cases, *supra,* and by the Court of Claims in the *Tlingit & Haida* case, *supra,* is to the contrary." See *supra,* pp. 14–18. Indeed, the Wheeler-Howard Act controverts the assertion that the Alaskan natives have not been treated as wards of the United States. That Act, entitled the "Indian Reorganization Act," is described in *Federal Indian Law* (Dept. of Int., 1958, pp. 128–129) as one of the three most comprehensive measures dealing with Indian affairs. The same work, at page 938, states that the extension of the Act to Alaska, accomplished by the Act of May 1, 1956, 49 Stat. 1250, "has removed the last significant difference between the position of the American Indian and that of the Alaska native."

3. While recognizing that there have been conflicting views on the question whether the use of fish traps should be outlawed, the Alaska court's discussion would indicate that this was simply a contest between economic interest on the one side and conservation and social interests on the other (Opinion 4–10, 24, 28–29). There was, of course, no evidence taken from expert biologists or others on these factual matters. The fact is that there is substantial basis to support

[19] The Court of Claims in its opinion (177 F. Supp. at pp. 454–456, 461–462) discusses the nature of the Alaskan native villages at some length and its findings, not printed in the Federal Supplement, describe the matter in great detail (Fdgs. 23–32).

the conclusion that fish traps, which are fixed in place, can more easily be regulated to promote conservation than can many moving boats. It is inappropriate to engage here in an extended discussion on this subject. However, the Department of the Interior has advised us that the 11 traps operated in the 1961 season produced a catch of some 1,022,449 fish, valued at $547,785, and that the total catch "is in excess of any year since 1949."[20] This seems contradictory to the picture of a constantly dwindling supply of fish caused by traps, as the opinion below would seem to indicate (*e.g.*, 5–6).

4. Finally, it should be emphasized that the Supreme Court of Alaska misunderstands our position when it says that the government claims a reserved right to regulate fishing by individual natives anywhere in Alaska (Opinion 27, 28–29). We do not make any such claim in this case. What this case involves are the fish traps that had been operated by the native *villages* or *communities* in the past.[21] The court's refusal to recognize the difference between

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[20] For comparison purposes, the catch in the last seven years was as follows:

Year	Number of Traps	Number of Fish	Value
1955	8	351,373	$166,700
1956	9	525,866	275,705
1957	8	266,387	158,547
1958	11	536,619	302,750
1959	11	327,466	231,265
1960	11	173,284	100,541
1961	11	1,022,449	548,184

[21] The legislative history of Section 4 of the Statehood Act is addressed to the village or group activities, not to fishing by individual natives throughout Alaska.

the problems of this case—the communal fishing by the villages in their long accustomed places—and the activities of individual natives throughout the State, appears again in the incorrect comparison between the total catch of the village trap and that of "a gill net or purse seine fisherman" "from the point of view of conservation" (Opinion 29). The true comparison, if relevant at all, would be between the fishing of the entire village, as a community, and the catch of the village's traps.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
Attorney.

NOVEMBER 1961.

APPENDIX A

The Alaska Statehood Act, 72 Stat. 339, provides in pertinent part as follows:

Section 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

* * * * *

Section 4.

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any

lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

* * * * *

Section 6 (e).

* * * *Provided,* That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: * * *.

* * * * *

Section 8 (d).

Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

* * * * *

2. The Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, provides in Section 2, under the rubric "Federal Jurisdiction":

> (a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives".
>
> (b) Section 6(e) of said Act is amended by striking out the word "legislative" and inserting in lieu thereof the word "calendar".

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., May 4, 1960.

By messenger
90-2-0-544

Hon. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington, D.C.

Dear Mr. Rankin:

We have reviewed the draft of brief which you propose to file *amicus curiae* in the Supreme Court in *Metlakatla Indian Community, Annette Island Reserve* v. *Egan, Governor of Alaska, et al.*, No. 326, and in *Organized Village of Kake, et al.* v. *Egan, Governor of Alaska*, No. 327.

We are pleased to see that your study of these cases has led you to conclude that the court has jurisdiction and that the cases have not become moot. We are also pleased to note your position that the purpose of section 4 of the Alaska Statehood Act was to maintain the status quo until the Congress should provide otherwise. That is the position which this Department has consistently taken and which has been communicated to you in our prior correspondence and discussions.

In response to your invitation, we should like to restate and expand the expression of the views and position of the Department of the Interior on two points which are touched upon by the proposed brief

and which have been the subject of several discussions between representatives of our two departments. These being matters of predominant importance to the natives of Alaska they are, by that token, of the greatest concern to the Secretary of the Interior in his traditional role as the officer of the executive branch of the Government charged by law with the administration of Indian affairs and the execution of the national policy respecting the Indians.

The two points to which we refer are somewhat interrelated. They have to do with (1) whether the purpose and effect of section 4 of the Alaska Statehood Act, as amended, was to define and classify Indian fishing rights as vested, compensable property, and (2) the scope of the Secretary's regulatory power over the Indian fishing activity.

Section 4 of the amended Statehood Act preserves in status quo full Federal control over Indian lands and other property, including fishing rights. It does this in terms that withhold these matters from the reach of State authority, reciting specifically that they shall "be and remain under the absolute jurisdiction and control of the United States." Quite clearly, from the language of section 4 in its entirety as well as its legislative history, Congress manifested its intent to maintain the status quo, taking this action with knowledge of the prior rulings of the Supreme Court which recognized that the ultimate power to resolve the problem of native rights in Alaska rested with the Congress. See *Hynes* v. *Grimes,* 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). This means to us that the Congress maintained in status quo the position of the United States as it existed immediately before statehood, namely, the continuation of full Federal control over the Indian fishing activity and the retention of full Federal power to define, classify, resolve and determine the nature and extent of Indian fishing rights.

Also, the Congressional purpose to maintain the status quo must mean to us that the Indians' rights, whatever their nature, were preserved under full Federal authority for ultimate determination by the Congress or the courts. The act made clear the lack of State authority but made nothing compensable as against the United States which was not compensable before statehood. We feel these conclusions must surely inhere in the conception that the Statehood Act was designed to maintain the status quo.

Any exercise by the Secretary of the Interior of regulatory power over the Indian fishing activities obviously must be by way of implementation of the Statehood Act and cannot be contrary to the Congressional objective of maintaining the status quo. So considered, the Secretary of the Interior in regulating the Indian fishing activity was required to continue the Indians' fish-trap operations as he found them to be immediately before statehood. The statute speaks in terms of the *natives'* fishing rights which, as we have demonstrated, are to be maintained in status quo until the Congress or the courts may clarify or resolve the matter. It follows logically that the natives' fishing rights could not be maintained in status quo by the Secretary of the Interior regulating their fishing activity in a way that would limit it to something less than that visible to the Congress when section 4 of the Statehood Act was enacted. Moreover, the Statehood Act, speaking in terms of native fishing rights cannot be equated into a grant of power to the Secretary to limit or eliminate Indian fishing. We must reject categorically the idea that section 4 of the Statehood Act, designed to maintain the status quo, also clothed the Secretary of the Interior with unlimited discretionary authority to limit or shrink the Indian fishing activity that existed on the instant before statehood. It has been recognized by the courts

that the power to regulate cannot be exercised in a way that abridges or destroys the Indian rights which are the subject of the regulation. See *Mason* v. *Sams*, 5 F. (2d) 255 (1925); *Tulee* v. *Washington*, 315 U.S. 681 (1942). And no remnants of regulatory power under the White Act (48 U.S.C. 221) could have survived the Statehood Act so as to clothe the Secretary with discretionary authority to limit or destroy the Indian fishing activity which Congress had held in status quo. The view that the Secretary of the Interior is clothed with full discretionary authority under the White Act to shrink the Indian fishing activity after the enactment of the Statehood Act undermines and makes ineffective the entire concept of Congress having maintained the status quo until it could resolve the problem of native rights as a matter of legislative prerogative. Indeed, the argument in favor of full discretionary authority in the Secretary to regulate Indian fishing after Alaska statehood must lead to the illogical conclusion that the Secretary of the Interior, being without Congressional direction or limitation, could not only limit the Indian fishing activity but could enlarge it as well. Here, again, the fallacy of the view that the Secretary has full discretionary authority is demonstrated merely by reference to the Congressional intention to preserve the status quo.

Historically, the purpose of retained federal controls in Indian matters has always been the protection of the Indians, and the Secretary of the Interior, in the exercise of regulatory authority over the subject denominated by the Congress as Indian "fishing rights" could not lose sight of the historical obligation to protect the Indians' rights, and to do so within the law.

To summarize:

1. The purpose and effect of section 4 of the Alaska Statehood Act was to maintain the status quo, leaving undisturbed after statehood the noncompensable character of those Indian fishing activities which were noncompensable before statehood.

2. The Secretary of the Interior, in exercising regulatory authority over the Indian fishing activity, must do so by way of implementation of the Statehood Act and cannot, by regulation, limit or terminate the fish-trap operations in which the Indians were engaged immediately before statehood.

Sincerely yours,

GEORGE W. ABBOTT, *Solicitor.*

[*Note:* By letter of August 3, 1961, to the Department of Justice, the Department of the Interior stated that it still maintained the views set forth in the Solicitor's letter of May 4, 1960, *supra.*]

U. S. GOVERNMENT PRINTING OFFICE: 1961